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No. 94-6187

In The

Supreme Court of the United States

October Term, 1994

STEVEN KURT WITTE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does punishment for a federal offense violate the Double Jeopardy Clause if that offense was already included within the "relevant conduct" for which the defendant was sentenced under the federal sentencing guidelines as a result of a prior prosecution?

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This amicus brief is filed pursuant to Rule 37 of the United States Supreme Court. Both petitioner and respondent have granted amicus consent to file this brief, and the letters of consent have been filed with the Clerk of the Court.

INTEREST OF AMICUS

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation which currently has a membership of more than 8,000 attorneys and 28,000 affiliate members in 50 states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded over 25 years ago to promote study and research in the field of criminal defense law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives is to insure the proper administration of criminal justice and to protect individual rights guaranteed by the Bill of Rights. Thus, members of the NACDL have a vital interest in ensuring that the Double Jeopardy Clause of the Fifth Amendment is construed to prevent the government from seeking a second punishment for an offense when it is not satisfied with the sanction obtained in the first proceeding.

SUMMARY OF ARGUMENT

The prosecution of Steven Kurt Witte for a cocaine offense that was already taken into account to enhance his base offense level under the United States Sentencing Guidelines for a prior sentence on a marijuana offense violates his rights under the Double Jeopardy Clause of the Fifth Amendment. The Fifth Circuit panel assumed

that the cocaine offense for which Witte was punished as part of his prior marijuana sentencing was the "same offense" as the cocaine importation offense for which he now faces prosecution. This assumption was in fact correct under this Court's recent decision in *United States v. Dixon*, 509 U.S. ___, 113 S.Ct. 2849 (June 28, 1993). However, the panel incorrectly looked to legislative intent to determine whether a second punishment for the "same offense" constitutes double jeopardy. Since the two offenses were the same, the Double Jeopardy Clause bars any further punishment in a successive proceeding. *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. ___, 114 S.Ct. 1937 (June 6, 1994); *United States v. Halper*, 490 U.S. 435, 450 (1989). Legislative intent bears on double jeopardy punishment analysis only when the challenged second punishment is imposed in the same proceeding as the first punishment.

ARGUMENT

I.

THE QUESTION WHETHER THE INDICTMENT IN THIS CASE PLACES THE PETITIONER IN JEOPARDY OF A PROHIBITED SECOND PUNISHMENT FOR THE SAME OFFENSE DOES NOT DEPEND ON LEGISLATIVE INTENT

The Double Jeopardy Clause of the Fifth Amendment provides that no one shall "be subject for the same offence to be twice put in jeopardy of life or limb." There are two pertinent components of the Double Jeopardy

Clause; the first protects against a subsequent prosecution for the same offense after acquittal or conviction (the prosecution component), while the second protects against multiple punishments for the same offense (the punishment component). *Schiro v. Farley*, 510 U.S. ___, 127 L.Ed.2d 47, 56 (Jan. 19, 1994); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

The two components are treated differently. Multiple prosecutions by the same sovereign for the same offense always constitute double jeopardy. *United States v. Dixon*, 113 S.Ct. at 2856. In this context, the analysis is governed by the "same-elements" test known as the *Blockburger* rule, which "inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars [both] additional punishment and successive prosecution." *Dixon*, 113 S.Ct. at 2856 (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). By contrast, multiple punishments for the same offense may or may not violate the Double Jeopardy Clause. *Missouri v. Hunter*, 459 U.S. 359, 367-68 (1983). Multiple punishments constitute double jeopardy only if they are not authorized by the legislature, *Whalen v. United States*, 445 U.S. 684, 691-92 (1980), *or* if they are imposed in successive proceedings. *Halper*, 490 U.S. at 450; *Kurth Ranch*, 114 S.Ct. at 1948.

The requirement that multiple punishments for the same offense be imposed in a "single proceeding" is a fundamental constitutional principle. *See Kurth Ranch*, 114 S.Ct. at 1948 ("[I]t is a second punishment within the contemplation of a constitutional protection that has 'deep roots in our history and jurisprudence,' and therefore must be imposed during the first prosecution or not

at all.") (citing *Halper*, 490 U.S. at 440). This "single proceeding" requirement is independent of, and in addition to, the requirement that the multiple punishments be authorized by the legislature. *Halper*, 490 U.S. at 451 n. 10 ("That the Government seeks the civil penalty *in a second proceeding* is critical in triggering the protections of the Double Jeopardy Clause.") (emphasis added).

The Fifth Circuit panel assumed that the cocaine offense for which Witte was, in part, punished in the first (marijuana) proceeding was the "same offence" as the offense for which he is now indicted and would face punishment if convicted in the second proceeding:

> Thus both parties assume that the "same offense" element is satisfied under the test enunciated in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). But clearly the statute under which Witte was convicted and the statutes under which he is now indicted proscribe different offenses, i.e., aiding and abetting possession of a controlled substance (21 U.S.C. §841(a)(1); 18 U.S.C. §2) [in the prior case], and conspiring to import, and aiding and abetting in the attempt to import, a controlled substance (21 U.S.C. §§952(a), 963; 18 U.S.C. §2) [in the instant case]. *Cf. Hunter*, 459 U.S. at 367, 103 S.Ct. at 678-79; *United States v. Cruce*, 21 F.3d 70, 75-76 (5th Cir. 1994). *We address the issues in this case, however, as they were presented by the parties.*

United States v. Wittie, 25 F.3d 250, 255 n. 17 (5th Cir. 1994) (emphasis added). The panel then analyzed whether Congress intended to permit multiple punishments for the "same offense." *Wittie*, 25 F.3d at 255 ("If the legislature

intended to impose multiple punishments for the same offense, imposition of such sentences does not violate the Constitution."). The Fifth Circuit panel failed to consider the threshold inquiry: whether the challenged multiple punishments were imposed in a single proceeding. That is, the panel did not address, and perhaps simply overlooked, this Court's decisions in *Kurth Ranch* and *Halper*. Certainly, it did not cite either case.[1] Thus, whether or not multiple punishments of Witte for the same offense were authorized by Congress, the Double Jeopardy Clause bars the second punishment because the government seeks to impose that punishment in a successive proceeding. *See Kurth Ranch*, 114 S.Ct. at 1948 (invalidating a *legislatively-authorized* successive punishment); *Halper*, 490 U.S. at 451 (same).

The Fifth Circuit panel's conclusion that Congress authorized "multiple punishments" for the same offense – in addition to being immaterial to the analysis of a case where the same sovereign seeks a second punishment in a separate proceeding – finds no support in the United States Sentencing Guidelines. Absent evidence to the contrary, it is assumed "that Congress ordinarily does not intend to punish the same offense under two different statutes." *Ball v. United States*, 470 U.S. 856, 861 (1985). The Fifth Circuit panel found that there was clear evidence that Congress intended to permit the punishment

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[1] The Fifth Circuit decided *Wittie* on June 23, 1994. Just 17 days earlier, this Court had reaffirmed the principle, unanimously endorsed in *Halper*, that all punishment for the same offense must be imposed in a "single proceeding." *See Kurth Ranch*, 114 S.Ct. at 1948.

of Witte twice for the same offense. Specifically, the panel held that U.S.S.G. §5G1.3(b) was "authority . . . that Congress intended to punish a defendant a second time for conduct that has previously been aggregated into the base offense level for a related sentence in an earlier prosecution." *Wittie*, 25 F.3d at 260. Section 5G1.3, in its present version, provides in pertinent part:

> *Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment*
>
> (b) If . . . the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.

The Fifth Circuit panel inferred from this provision that Congress anticipated the imposition of punishment in a second proceeding, and therefore, did not intend to preclude the second proceeding. *Wittie*, 25 F.3d at 260; *see also United States v. Cruce*, 21 F.3d 70, 77 n.11 (5th Cir. 1994). There are several flaws in the Fifth Circuit's analysis.

First, the court below relied for its analysis of "legislative intent" on a provision that did not exist either at the time of the petitioner's offenses, or at the time of his sentencing. Section 5G1.3 of the Guidelines contains the Sentencing Commission's guidance to judges exercising their discretion under 18 U.S.C. §3584(a)-(b) to decide whether to impose a concurrent or consecutive sentence on a defendant who is already imprisoned serving

another sentence.[2] That section has been one of the most frequently amended within the Guidelines Manual, with substantially different versions in effect from November 1, 1987, until 1989, from November 1989 to 1991, from November 1991 to 1992, from November 1992 to 1993, and another since November 1993.

The version looked to by the court below was the November 1993 revision, but in February 1991, when the marijuana offense was committed, as well as in August 1990 when the cocaine offenses were committed, section 5G1.3 of the Guidelines addressed only new offenses committed *while* the defendant was serving a term of imprisonment. *See* U.S.S.G. Manual, appx. C, amend. 385; *see also id.*, amend. 465 (version in effect in July 1992, at time of sentencing). At that time, the question of concurrency in cases such as this petitioner's was addressed only in the Commentary. Commentary, unlike the guidelines themselves (while expressing the Commission's authoritative but nonbinding views concerning the proper application of the Sentencing Reform Act and Guidelines), is not submitted for approval to Congress and therefore cannot be looked to as an expression of "legislative intent." *See Stinson v. United States*, 508 U.S. ___, 123 L.Ed.2d 598, 605-06 (May 3, 1993). At best, the 1993 amendments to U.S.S.G. §5G1.3, as approved by Congress, which is what the court below analyzed, represent subsequent action on the same subject, a shaky basis for inferring legislative intent in any case. *See Ratzlaf v.*

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[2] The Commission's rules with respect to concurrency *vel non* in a single, multi-count case are contained in U.S.S.G. §5G1.2.

United States, 510 U.S. ___, 126 L.Ed.2d 615, 626 n.18 (Jan. 11, 1994).[3]

Even under the current version of §5G1.3, the lower court's conclusion is unpersuasive. This Court has long adhered to the principle that statutes should be construed to avoid untenable distinctions and absurd results whenever possible. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982); *Commissioner of Internal Revenue v. Brown*, 380 U.S. 563, 571 (1965). Section 5G1.3(b) cannot stand for the broad proposition urged by the Fifth Circuit panel because its acceptance would lead to results that could not have been intended by Congress. Section 5G1.3(b) applies only to a defendant who, at the time of sentencing, is already *subject to an undischarged term of imprisonment;* section 5G1.3(b) has no counterpart in the Guidelines for a defendant, facing a second prosecution, whose prior term of imprisonment for that offense *has been fully served*. If, in the Fifth Circuit's view, §5G1.3(b) is

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[3] Moreover, the most recent expression of congressional intent on this subject points the other way. Specifically, 18 U.S.C. §3553(f), effective September 23, 1994, enables a defendant convicted of a narcotics offense to be sentenced in accordance with the applicable guidelines without regard to any statutory minimum, if the defendant, in addition to satisfying other criteria, discloses to the government "all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." It is inconceivable that Congress intended, on the one hand, to encourage a defendant to provide the government with a full confession about his related "offenses" in exchange for a sentence below the mandatory minimum and, on the other hand, to permit the government to initiate a second prosecution and seek a second punishment for those related offenses.

the sole authority that Congress intended multiple punishments for the same offense on a defendant *subject to an undischarged term of imprisonment*, then there is no authority for the imposition of multiple punishments for the same offense on a defendant whose prior term of imprisonment has been fully served. It is difficult to envision a rationale under which Congress could have intended a defendant serving an undischarged term of imprisonment to suffer the direct and collateral consequences of a second conviction for the same offense conduct already punished, and not have intended the same consequences on a defendant whose term of imprisonment has expired.[4]

That U.S.S.G. §5G1.3(b) is not an expression of congressional intent to authorize multiple punishments for the same offense conduct does not render it superfluous. Section 5G1.3(b) is necessary to deal with those situations when the Double Jeopardy Clause is not implicated, such

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[4] Although the sentencing scheme dictated in §5G1.3(b) might perhaps ensure that the imprisoned defendant who faces multiple punishments would receive a reduction of his guideline for time served and a new term of imprisonment that would run concurrently with his undischarged term of imprisonment, the two sentences would in no event be fully concurrent. *See Ray v. United States*, 481 U.S. 736 (1987) (holding that a defendant who has been sentenced to concurrent prison terms on two counts is not in fact serving "concurrent sentences" because of mandatory imposition of a special assessment per count of conviction pursuant to 18 U.S.C. §3013). Moreover, there are other collateral consequences to a second conviction and punishment. *See Ball v. United States*, 470 U.S. 856, 864-65 (1985) (describing all of the collateral consequences that flow from a second conviction, even if concurrent).

as when separate sovereigns have prosecuted a defendant for the same course of conduct. *See Abbate v. United States*, 359 U.S. 187, 194 (1959) (federal prosecution not barred by prior state prosecution of the same person for same acts). Section 5G1.3 reflects Congress' intent to consolidate punishment, whenever possible, into one unitary analysis, and to accommodate the incongruities that are inevitable when both a state and federal sovereign elect to prosecute an individual for the same conduct. Section 5G1.3(b) is not authority that Congress intended to impose cumulative punishments for the same offense.[5]

The court below accepted the premise that petitioner's present indictment seeks a conviction for the sole purpose of imposing punishment for some of the "same offense[s]" as were penalized by an enormous increase in the sentence imposed on him in the prior case. *Wittie*, 25 F.3d at 255 n. 17. On that premise, the Fifth Circuit panel was bound to affirm the dismissal of the second indictment. The only real issue in this case is the issue summarily disposed of by the Fifth Circuit's assumption: whether petitioner was punished in the first case for the

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[5] To the extent that the Commentary to §5G1.3 now speaks in terms of punishments imposed in "two or more federal jurisdictions," *see* Application Note 2, that Commentary is incompatible with the Double Jeopardy Clause's requirement that multiple punishments be imposed in a single proceeding, conflicts with other provisions of the Guidelines, and is a plainly erroneous reading of that particular guideline. *See Stinson v. United States*, 113 S.Ct. at 1915 (noting that Commentary is not authoritative when "it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline").

"same offence" as the instant indictment proposed to punish him for again.

II.

UNCHARGED OFFENSES WHICH ARE PART OF A DEFENDANT'S "RELEVANT CONDUCT" UNDER THE UNITED STATES SENTENCING GUIDELINES ARE "OFFENSES" FOR PURPOSES OF THE *BLOCKBURGER* DOUBLE JEOPARDY TEST

The Double Jeopardy Clause speaks in terms of "same offence" rather than "same elements" or "same conduct." *U.S. Const, Amdt 5.* Although the *Blockburger* "same-elements" analysis has "historical roots," *see generally Dixon,* 113 S.Ct. at 2860, that inquiry is just a method to determine congressional intent in defining offenses.

> The *Blockburger* test is a "rule of statutory construction," and because it serves as a means of discerning congressional purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent.

Albernaz v. United States, 450 U.S. 333, 340 (1981). The double jeopardy guarantee is not a restraint on the ability of the legislature to define offenses; rather, it "serves principally as a restraint on courts and prosecutors." *Brown v. Ohio,* 432 U.S. 161, 165 (1977). In *Brown,* the Court stated:

> The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted

> courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.

432 U.S. at 165; *see also Whalen v. United States*, 445 U.S. at 689 ("The power to define criminal offenses and to prescribe punishments to be imposed upon those found guilty of them, resides wholly with Congress.").

The instant case is not, under *Dixon*, a "successive prosecution" for the "same offense" as that for which petitioner was previously *convicted* (*i.e.*, possession of marijuana in Texas in 1991 with intent to distribute). But, under the Guidelines regime, the instant indictment nonetheless charges only *offenses* for which petitioner was previously *punished* (conspiracy and attempt to import cocaine from Guatemala in 1990 during what the judge in the first case found to be the same continuing course of illegal conduct). A prosecution that seeks only prohibited successive punishment must be dismissed on Double Jeopardy grounds, regardless of whether that indictment constitutes a prohibited successive prosecution.[6] The Clause's two protections, while often cognate, are not

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[6] After all, what the Fifth Amendment literally prohibits is precisely the second *jeopardy*, not the second punishment as such. The second indictment of petitioner is therefore barred because that proceeding puts the defendant *in jeopardy of* a second punishment for the same offense. This is the same rationale under which a prosecutorial appeal from a judgment of acquittal is barred – not because the appeal process is itself a second prosecution, but because the end sought by that appeal, a new trial, would be barred by the Double Jeopardy Clause. *See Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986); *United States v. Scott*, 437 U.S. 82 (1978); *United States v. Ball*, 163 U.S. 662 (1896).

always, as this case demonstrates. *Cf. Kurth Ranch*, 114 S.Ct. at 1957 (Scalia, J., dissenting) ("Even if it were thought to be the former, the Double Jeopardy Clause's ban on successive criminal prosecutions would make surplusage of any distinct protection against additional punishment imposed in a *successive prosecution*, since the prosecution *itself* would be barred.").[7] As both *Kurth Ranch* and *Halper* show, the protection against successive punishment comes into play when the same sovereign seeks a second time to punish the same criminal offense.

The United States Sentencing Guidelines require judges to punish for offenses in addition to the offense of conviction, implicating the Double Jeopardy Clause in a new way. The Guidelines "revolutionized the manner in which district courts sentence persons convicted of federal crimes." *Burns v. United States*, 501 U.S. 129, 132 (1991). The Guidelines were designed to achieve consistency in sentencing by grouping similar harms and requiring courts to account for similar conduct and punish the aggregate relevant offense conduct in one sentencing proceeding. *See generally* U.S.S.G. Ch. 1, Pt.

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[7] Thus, the punishment prong of double jeopardy protection is not always redundant. A prohibited second punishment may result from a proceeding which is not a prosecution (as in *Kurth Ranch* and *Halper*) or from a prosecution which seeks both permissible and prohibited punishment (such as a hypothetical variation of the instant case, in which Witte is charged not only with the previously-punished cocaine offense, but also with some other offense, properly joined in a single indictment, such as a related money laundering or firearms charge, which had not previously been punished). Concomitantly, a prohibited successive prosecution may exist where there has been no prior punishment, as where the first case ended in acquittal or an unnecessary mistrial.

A, ¶4 (p.s.); Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L.Rev. 1, 8-12 (1988); Wilkins and Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 So.Car.L.Rev. 495 (1990). The Guidelines were written "in order to minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence." U.S.S.G. Ch. 1, Pt. A, ¶4(e) (p.s.). This "modified real offense" approach is aimed at fulfilling one of the stated goals of the Guidelines – the confiscation from prosecutors of the power to manipulate indictments so as to influence sentences arbitrarily. U.S.S.G. Ch. 1, Pt. A, ¶4(a) (p.s.).

Congress sought to achieve these goals by defining the term "offense" in the Guidelines. "Offense means the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context." *See* Application Note 1(l) to U.S.S.G. §1B1.1. A defendant's base offense level for each "offense" *must* be determined on the basis of the "offense of conviction" *plus* "all relevant conduct," as defined in U.S.S.G. §1B1.3.

> *Relevant Conduct (Factors that Determine the Guideline Range)*
>
> (a) *Chapters Two (Offense Conduct) and Three (Adjustments).* Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, *shall* be determined on the basis of the following:

> (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,
>
> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;
>
> (2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above *that were part of the same course of conduct* or common scheme or plan as the offense of conviction;

U.S.S.G. §1B1.3(a) (emphasis added).

The relevant conduct rules require a district court, in a case such as petitioner's, to punish a defendant for all other "offenses" that are part of the same course of conduct as the offense of conviction. *Wittie*, 25 F.3d at 258. Section 2D1.1 is the guideline for the sentencing of all federal drug offenses involving the "Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses);

Attempt or Conspiracy." Under U.S.S.G. §3D1.2(d), all offenses punishable under U.S.S.G. §2D1.1 are to be grouped for purposes of arriving at a single calculation of offense severity based on the aggregate quantity of drugs involved. (The Commentary to §2D1.1 even provides a Drug Equivalency Table that permits the aggregation of quantities of different drugs such as the marijuana and cocaine involved in this case; *see* Application Note 10.)

Thus, the statutory offense charged in an indictment does not circumscribe the full panoply of offenses for which a defendant must be held accountable under the Guidelines. *See also* §5G1.3 (describing a prior sentence as being for "offenses" for which a defendant has not been *convicted* until a subsequent case). When a defendant such as the petitioner is indicted for a federal narcotics offense, he is put in jeopardy, under the United States Sentencing Guidelines, not only for that statutory offense; he is put in jeopardy of punishment for all statutory offenses groupable under §3D1.2(d) and committed in the same course of conduct as that statutory offense, whether or not charged. The Guidelines' approach to punishing defendants for offenses not charged in the indictment represents the Guidelines' " 'real offense' approach to drug crimes based upon the proposition that the amount of punishment inflicted on an accused should depend upon what really transpired as opposed to what was charged." *United States v. Koonce*, 945 F.2d 1145, 1150 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 1695 & 1705 (1992).

Dismissal of Witte's second indictment, therefore, is consistent with this Court's recent holding in *United States v. Dixon*, 509 U.S. ___ (1993), in which the Court overruled the "same conduct" test approved in *Grady v.*

Corbin, 495 U.S. 508 (1990). The respondent Dixon was released on bond after being charged with second degree murder. Dixon's release form specified that he was not to commit "any criminal offense" while released on bond. Dixon, however, violated his bond conditions by possessing cocaine with intent to distribute. The trial court ordered Dixon to show cause why he should not be held in contempt for violating his bond conditions. Dixon was also indicted for possession of cocaine with intent to distribute. After Dixon was found guilty of criminal contempt and sentenced to 180 days in jail, he moved to dismiss the cocaine indictment on double jeopardy grounds. 113 S.Ct. at 2853. The trial court dismissed the indictment based on the "same conduct" test announced in *Grady v. Corbin*, and the District of Columbia Court of Appeals affirmed.

Although this Court expressly overruled the *Grady* "same conduct" test, the Court nonetheless held that the prosecution of Dixon for the cocaine offense after conviction of the criminal contempt was barred by the *Blockburger* rule. 113 S.Ct. at 2856-58 (opinion of Scalia and Kennedy, JJ.); *id.* at 2874-75, 2890-91 (opinion of White, Stevens, and Souter, JJ.). The Court so held despite the fact that the elements of contempt of court differ from the elements of cocaine possession under a strict *Blockburger* analysis. *Dixon*, 113 S.Ct. at 2865 (Rehnquist, C.J., with O'Connor and Thomas, JJ., dissenting in part) (expressing view that the majority employed the very conduct-based test it purported to reject). The Court reasoned that the court order violated by Dixon "incorporated the entire governing criminal code," and the Court treated the cocaine offense as a "species of lesser-included offense"

of the entire criminal code, for which the Double Jeopardy Clause bars a successive prosecution. *Dixon*, 113 S.Ct. at 2857; *see also Harris v. Oklahoma*, 433 U.S. 682 (1977) (lesser-included offense may not be prosecuted after prosecution for the greater offense).

The *Dixon* majority was faithful to the *Blockburger* rule by looking beyond the charged contempt offense, not to conduct, but to other offenses necessarily incorporated therein. Just as the court order violated by Dixon incorporated the entire District of Columbia criminal code, every federal offense implicates, for punishment purposes, the entire Federal Sentencing Guidelines scheme, and every federal indictment thus incorporates all offenses that are required to be counted as part of the "relevant conduct" for the offense(s) charged therein. When Witte was indicted for the marijuana possession offense, he was put in jeopardy of punishment for the cocaine importation offense as well; and, when he was convicted of the marijuana offense, he faced mandatory punishment for the cocaine offense.[8] Under the Guidelines scheme, the cocaine importation offense for which Witte now stands indicted was an "also-included offense" for punishment

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[8] While it is true that a defendant cannot be sentenced to a term of imprisonment greater than the statutory maximum of the offense that is charged in the indictment regardless of the relevant conduct, this does not undermine the double jeopardy analysis. The government must live with its charging decisions. The Double Jeopardy Clause should serve as an encouragement to the government to bring all related charges against a defendant in one indictment to the extent possible under other constraints, such as venue. *See United States v. McCormick*, 992 F.2d 437, 441 (2d Cir. 1993).

purposes in the marijuana indictment, just as was the drug charge Dixon faced after his contempt sentence. Witte's sentence on the marijuana offense represents a final determination of the appropriate aggregate federal sentence for all of his related offenses. By now indicting Witte for the cocaine offense, the government is putting Witte twice in jeopardy of punishment for the same offense.[9]

Williams v. Oklahoma, 358 U.S. 576, 584-86 (1959), does not mandate a contrary result. That case was decided a decade before the Double Jeopardy Clause was held fully applicable to the states. *See Benton v. Maryland*, 395 U.S. 784 (1969). *Williams* held that the fundamental fairness protected by the Due Process Clause of the Fourteenth Amendment was not offended by the consideration, at a capital sentencing for kidnaping, of the aggravating factor that the defendant had killed the victim, even though the defendant had previously been prosecuted for that murder in another county and sentenced to life imprisonment. Even if the precedential value of that case is not diminished by the obvious unconstitutionality (under several later cases) of the death penalty that was there

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[9] This conclusion is not foreclosed by *United States v. Felix*, 503 U.S. ___, 112 S.Ct. 1377 (March 25, 1992), wherein the Court held that a subsequent prosecution for conspiracy to manufacture methamphetamine was not barred by a previous conviction for attempt to manufacture the same substance. *Felix* involved offenses that occurred prior to November 1, 1987. It did not involve application of the Guidelines, which redefined the punishment scheme, *requiring* "offenses" other than those charged in the indictment to be included in the punishment calculation.

imposed and affirmed,[10] the case is readily distinguishable because it concerned a fully discretionary sentencing scheme. The judge was authorized, but not required, to consider any and all mitigating and/or aggravating factors (including the death of the victim at the hands of the defendant) to determine the proper punishment (within a range of ten years' imprisonment to death) for the kidnaping. The death sentence could fairly be described as being for aggravated kidnaping and not for murder. Here, by contrast, the Guidelines explicitly treat the prior cocaine offense not as an aggravating circumstance of petitioner's subsequent marijuana violation, but as an additional offense – labeled as such – to be punished on that occasion,[11] simply because it met the two criteria for inclusion as "relevant conduct" (it would have been groupable under §3D1.2(d) had it been charged, and it occurred as part of the same course of conduct).

In federal guidelines sentencing, a defendant's other criminal offenses, when they constitute "relevant conduct" under U.S.S.G. §1B1.3, are not treated as an aggravating factor that helps to measure the relative seriousness of the present offense. Nor are they used as a measure of the defendant's dangerousness and risk of recidivism, or as a sign that this defendant may need harsher punishment to deter him or her from future crimes. Those legitimate, traditional sentencing factors, which validated the kind of sentence imposed in *Williams*

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[10] *See, e.g., Furman v. Georgia*, 408 U.S. 238 (1972); *Coker v. Georgia*, 433 U.S. 584 (1977).

[11] This analysis also distinguishes the many cases upholding recidivist increments against double jeopardy challenges.

and other pre-Guidelines cases, are accounted for under the Guidelines by different rules. Aggravating circumstances that are thought to warrant higher sentences are set forth as "specific offense characteristics" under particular guidelines in Chapter 2 of the Manual, or as "victim-related adjustments" under Chapter 3A. If perchance a particular aggravating circumstance (such as the death of the kidnap victim in *Williams*) is not covered by one of those provisions, an upward departure under 18 U.S.C. §3553(b) and Chapter 5K may be warranted.

Likewise, U.S.S.G. §4A1.1 and §4A1.2 define a "criminal history category" that drives the punishment upward for those with prior convictions. And for defendants whose prior criminal conduct has not resulted in convictions, a policy statement at U.S.S.G. §4A1.3 suggests an upward departure if the conviction record understates the seriousness of a defendant's true prior record. The "relevant conduct" rule, on the other hand, represents a considered compromise between "conviction offense" and "real offense" sentencing. *See* Wilkins and Steer, *supra*. Under this regime, the defendant is deliberately *punished* for offenses other than the offense of conviction, so long as those other offenses are related to the conviction offense in defined ways and the total punishment falls within the (usually generous) range provided by the legislatively-defined maximum for the conviction offense. The Double Jeopardy Clause therefore must be construed to protect that defendant from being punished again, in a separate proceeding brought by the same sovereign, for those same offenses.

The position urged by amicus curiae herein is based on offenses, not conduct, and as such, is not the reincarnation of *Grady v. Corbin*. Nor will the proposed double

jeopardy analysis prove to be "unstable in application." *Dixon*, 113 S.Ct. at 2863. A district court is required under §1B1.3 to make particularized findings regarding relevant conduct. The other "conduct" to be punished must be a related criminal "offense." A defendant's presentence report will describe the uncharged offenses relied on by the district court to impose sentence in the first prosecution, and if contested, findings under Fed.R.Crim.P. 32(c)(1) (formerly (c)(3)(D)) will have to be made. Thus, federal courts evaluating double jeopardy claims of this kind will experience little if any difficulty in determining what offenses were previously punished as part of the relevant conduct in a prior sentence.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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